United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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P/S

75-1375

To be argued by
RICHARD A. GREENBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

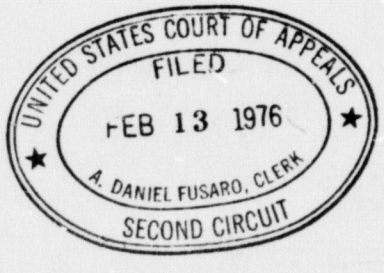
JOHNNIE A. NORMAN,

Appellant.

Docket No. 75-1375

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

Questions Presented

1. Whether the trial court's failure to order a competency examination pursuant to 18 U.S.C. §4244, upon learning of appellant's history of alcoholism and epilepsy, his previous treatment in a psychiatric hospital for those conditions, and counsel's present difficulty in communicating with and determining whether appellant comprehended the proceedings, requires the reversal of his conviction.

2. Whether the Government failed to establish that appellant knew the check cashed by "Hank" was forged.

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Henry Bramwell) entered October 24, 1975, convicting appellant Johnnie A. Norman after a jury trial of uttering a forged Government check in violation of 18 U.S.C. §495 and sentencing him to a two year prison sentence, execution of which was suspended, and a three year term of probation.

By order dated October 30, 1975, this Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel for appellant on this appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Johnnie Norman, a fifty year old alcoholic from the rural South with a second grade education (142, 153-158),* was indicted** in the Eastern District of New York for his alleged role in uttering a forged Veterans Administration check in the amount of $526.00 on March 5, 1973, in violation of 18 U.S.C. §495. Appellant was convicted on September 5, 1975, after a trial before the Honorable Henry Bramwell and a jury, and was sentenced on October 24, 1975, to a two year suspended sentence and a three year term of probation, with a special condition that appellant seek and receive treatment for alcoholism.

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* Numbers in parentheses refer to pagination in the transcript of appellant's trial. Additional information concerning appellant's background is found in his pre-sentence report.

** The indictment is "B" to appellant's separate appendix.

The Trial

It was stipultated at trial that the check in question was mailed by the Government on March 1, 1973, to the payee, John Mansfield, who lived on East 34th Street in Brooklyn (12-13). Moreover, the defense conceded that Mansfield never received the check and gave no authorization to anyone to sign his name to it (8, 14-17). Finally, appellant did not dispute the fact that he was present on March 5, 1973, in the office of his insurance broker, Marvin Plotnick, in the company of someone else who endorsed the check which Plotnick cashed, applying $200 of the proceeds towards appellant's car insurance premiums (8). Rather, the only substantial issue at trial was whether appellant knew that the person he was with had no authority to endorse the check and that that person had forged John Mansfield's signature.

The Government's Case

Plotnick testified that appellant was an insurance client of his to whom Plotnick occasionally gave winter clothes when he saw that appellant was not properly dressed (20, 33). On March 5, 1973, appellant came to Plotnick's office, located on 86th Street in Brooklyn, accompanied by another man whom appellant introduced as John Mansfield (20, 22). On this occasion, as on every other occasion when appellant came to Plotnick's office, appellant had been drinking (29, 31, 34, 37).

Appellant wanted car insurance which Plotnick said would require appellant to give a $200 deposit (21). Appellant stated that if Plotnick cashed his friend's check, appellant could give Plotnick the $200 deposit (21). Appellant told Plotnick that his friend was someone appellant knew "quite well," and that the check was his friend's veterans check (21-22). The friend also assured Plotnick that the check was his (38). After appellant "guaranteed that everything was okay" with the check, and Plotkin looked at "full identification" in the name of John Mansfield which the other man showed him, he agreed to cash the check (22, 43). Appellant's friend endorsed the check and presented it to Plotnick; appellant never touched it (41-42). After appellant signed a car insurance application which Plotnick had filled out for him, Plotnick gave the person he thought was "John Mansfield" $326.00 in cash (22, 36). When appellant and "Mansfield" began arguing over their respective shares of the money, Plotnick told them to "settle their argument outside," and the two men left (27). Sometime afterwards, Plotnick deposited the check in his wife's checking account (27).

One year later, Plotnick was contacted by the Secret Service who informed him that the check was forged (27). When appellant came to Plotkin's office in March, 1974, to purchase more insurance, Plotnick informed him of the Government investigation (28). Appellant stated that he had thought the check was "good" and that he knew the person who had endorsed it by the name of "John Mansfield" (25). He assured Plotnick that he

would "straighten everything out" and immediately called Agent Quinn of the Secret Service from Plotnick's office (28). Appellant spoke with Quinn's secretary, giving her the information concerning the check, and promising to show the Government agents where "John Mansfield" lived (28-29).

Special Agent Charles Quinn, the only other Government witness, testfied that he conducted the investigation of the forged Government check belonging to John Mansfield. After Plotnick informed him that the check had been cashed by appellant and a friend whom appellant had introduced as "John Mansfield," and upon receiving a telephone message from appellant leaving his name and address, Quinn interviewed appellant on April 17, 1974, in the vicinity of appellant's Coney Island apartment (84-85, 92). While appellant was co-operative and voluntarily answered Quinn's questions, Quinn noted that appellant had been drinking and was difficult to understand at times because of his slurred speech (93, 95-96, 97). During the interview, appellant first told Quinn that the man who had endorsed the check was known to appellant as John Mansfield (87). Later, however, appellant indicated that he did not know anyone named John Mansfield, that the man who endorsed the check was named "Hank," and that appellant did not know Hank's last name (88-89, 110). Appellant did tell Quinn that he thought "Hank" was the true owner of the check and was entitled to cash it (104-105). Moreover, appellant pointed out Hank's house to

Quinn (116), and subsequently called the United States Attorney's Office to let the Government know when Hank was at home (111-112).

On August 29, 1974, after Quinn had arrested appellant on the present charge, appellant again stated that the person who endorsed the check was known to him as "Hank" and that Hank had owed appellant a debt at the time the check was cashed (90-91).

The Defense Case

In colloquy prior to the commencement of the defense case, defense counsel "wanted to bring . . . to the Court's attention" (133) that appellant had a history of alcoholism and epilepsy, with the attendant problems of bleeding ulcers, cirrhosis of the liver, and delirium termors, and for which conditions he had been previously treated in Pilgrim State Psychiatric Hospital in February - March, 1975 (130, 133, 142, 157-158). Counsel also informed the Court that appellant had apparently suffered a seizure the night before he was to testify and had been given medication. As a result, counsel believed that appellant was "not as alert as I would expect him to be" (131); that the medication "had some effect on him and his speech is slower" (132); and that appellant "may have some difficulty in testifying" (132). More generally, counsel told the Court that she had "a bit of difficulty in determining whether or not [appellant] can fully comprehend the situation here" (130), and

that "it's always been difficult to communiticate" with appellant (131). The Court observed that "there had been times when witnesses said something and [appellant] has been very alert and he has been very responsive" (131). When the Court asked defense counsel whether appellant was "in a position to go forward," counsel responded, "I feel that is the defendant's choice" (133).

Appellant then took the stand and testified that he was unemployed and receiving disability payments for a head injury he had received years before, but a Government objection to this line of inquiry was sustained (144). He had started drinking when he was thirteen years old and now drank as much as six or seven pints of wine a day (153-155). On the day the check was cashed, appellant had been drinking since early morning (154). Appellant also testified he could neither read nor write (164).

Appellant had known "Hank" for three or four years from the neighborhood where Hank lived across the street from him, but in March of 1973, appellant did not know Hank's last name (161-163).. Appellant thought of Hank, with whom he often drank, as a friend and trusted him (163). Prior to March 5, 1973, appellant had cashed other checks for Hank without any difficulty or problems (163-164).

On March 5th, Hank owed appellant $200.00. When appellant was informed by Hank's brother-in-law that Hank had a check, appellant asked Hank for repayment of the debt (157). Unable to

cash Hank's check himself, appellant suggested that they cash the check at Plotnick's office, where appellant had to pay for car insurance anyway (157). On arriving there and being asked by the broker whether he knew Hank, appellant responded that he did (157). After looking at Hank's identification, which appellant did not see, Plotnick agreed to cash the check and Hank gave it to him after first endorsing it (157, 159). Appellant did not know whose name was on the check but thought it belonged to Hank since Hank had told him so (157, 159). Appellant never actually saw the check (159). $200.00 from the proceeds of the check were applied by Plotnick to appellant's insurance premiums (170). Appellant testified that he did not know anyone by the name of John Mansfield, and had not introduced Hank to Plotnick by that name (172, 183). Appellant only learned that Hank's check was forged a year later when he returned to Plotnick's office to purchase more insurance (167-168).

Appellant's sister, Jessie Witherspoon, also testified and stated that appellant had only a second grade education and had never learned to read or write. She was required to read appellant's mail to him. Appellant's sister further testified that appellant drank "every minute" and had been hospitalized for drinking at Coney Island Hospital (177-179).

The jury was charged on September 4, 1975, and after requesting to hear again Agent Quinn's and Plotnick's testimony (262), returned a guilty verdict on the afternoon of September 5, 1975. At his sentencing on October 24, 1975, appellant continued to maintain his innocence (S. 3).*

* "S" refers to pagination in the sentencing minutes of October 24, 1975.

POINT I

THE TRIAL COURT'S FAILURE TO ORDER A COMPETENCY EXAMINATION PURSUANT TO 18 U.S.C. § 4244, UPON LEARNING OF APPELLANT'S HISTORY OF ALCOHOLISM AND EPILEPSY, HIS PREVIOUS TREATMENT IN A PSYCHIATRIC HOSPITAL FOR THOSE CONDITIONS, AND COUNSEL'S PRESENT DIFFICULTY IN COMMUNICATING WITH AND DETERMINING WHETHER APPELLANT COMPREHENDED THE PROCEEDINGS, REQUIRES THE REVERSAL OF HIS CONVICTION.

During the course of appellant's trial, the Court was made aware, if it had not been before, of appellant's generally poor physical and mental condition, the fact that counsel had difficulty communicating with appellant, and the possibility that appellant did not fully comprehend the situation. The Court was further informed of defense counsel's belief that appellant might have difficulty testifying as a result of taking medication for a seizure appellant had experienced the night before. In light of this information, the Court was required, pursuant to 18 U.S.C. §4244, to direct that appellant be examined to determine his competency to stand trial. The Court's failure to do so may well have allowed appellant to be convicted while he was incompetent and, accordingly, his conviction should be reversed.

Section 4244 provides in relevant part that whenever there exists "reasonable cause to believe" that a defendant "may be presently insane or otherwise so mentally incompetent

as to be unable to understand the proceedings against him or properly to assist in his own defense," the Court "shall cause" the defendant to be examined by a psychiatrist upon motion by the Government, the defendant, or upon the Court's own motion. The test for incompetency under the statute is whether a defendant

> has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him.
>
> Dusky v. United States, 362 U.S. 402 (1960)

See also, United States v. Sullivan, 406 F.2d 180, 185 (2d Cir. 1969).

Moreover, under the statute,

> it makes no difference who raised the issue [of incompetence] or, for that matter, whether anyone "raised" it. Once there is reason to believe, whether from the evidence in the case, comments of counsel, behavior of the defendant, or whatever source, that a defendant in a criminal cause may be mentally incompetent within the meaning of Section 4244, it is mandatory that he be examined by a qualified psychiatrist and that the Court determine his mental competency before the proceedings continue.
>
> Featherston v. Clark, 293 F. Supp. 508, 515 (W.D. Tex. 1969), aff'd 418 F.2d 582 (5th Cir.) cert. den. 397 U.S. 937 (1970)

See also, United States v. Marshall, 458 F.2d 446, 450 (2d. Cir. 1972).

Here, counsel informed the Court that appellant had a history of epilepsy and alcoholism for which he had previously been treated at Pilgrim State Psychiatric Center in February - March, 1975. Appellant, himself, described the effect of his epileptic attacks:

> You don't know nothing when you have-- only thing you know -- nobody around, put a spoon in your mouth, pull up your tongue . . . that's the only thing you can remember when you come out.
> (153)

The Court was further informed that appellant not only had a bleeding ulcer, which apparently caused him to hold his stomach during trial (132), and cirrhosis of the liver, but that he had suffered another epileptic seizure the night before he was to testify, requiring him to take medication which may have caused him "some difficulty in testifying . . . his speech is slower." Finally, defense counsel informed the Court that "[i]t's always been difficult to communicate [with appellant]"; that appellant was "not as alert as I would expect him to be"; and that counsel had "a bit of difficulty in determining whether or not [appellant] can fully comprehend the situation here." These observations by defense counsel are entitled to considerable weight in determining the need for a competency examination for, as this Court has recognized, "The opinion of a defendant's attorney as to his ability to understand the nature of the proceedings and to cooperate in the preparation of

his defense is indeed significant and probative." United States ex rel. Roth v. Zelker, 455 F.2d 1105, 1108 (2d Cir. 1972).*

On the other hand, the fact that appellant may have appeared to the Court to be at times "very alert and . . . very responsive" during the trial cannot be dispositive on the question of his competency. "While [appellant's] demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing [or psychiatric examination] on that very issue. Pate v. Robinson, 383 U.S. 375, 384 (1966). **

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* While it is true that defense counsel here did not actually move for a psychiatric examination as to appellant's competency, she stated that she "wanted to bring [appellant's medical and psychiatric history] to the Court's attention." Moreover, when asked by the Court whether appellant was "in a position to go forward," counsel demurred, stating that "I feel that is the defendant's choice." Obviously, the decision on whether a defendant is competent to stand trial cannot hinge on the "choice" of the possibly incompetent defendant himself. An incopetent defendant cannot waive his right to a determination of his fitness to be tried by choosing to be tried on the merits. Drope v. Missouri, 420 U.S. 162, 176 (1975); Pate v. Robinson, 383 U.S. 375, 384 (1966); United States ex rel. Roth v. Zelker, supra.

** Indeed, if courtroom demeanor was dispositive, it would encourage otherwise competent defendants to "act out" in the courtroom to increase their chances of being found incompetent when the case was going against them. See United States v. Marshall, supra.

Moreover this was not a case in which appellant's apparently responsive and alert courtroom demeanor was coupled with "longstanding and successful contacts with his business, his family and the community." United States v. Vowteras, 500 F.2d 1210, 1212 (2d Cir. 1974). On the contrary, appellant was a "pathetic" alcoholic and epileptic, with no more than a second grade education, who was presently unemployed and receiving Social Security disability payments.*

The foregoing information concerning appellant's personal background and mental and medical history, coupled with counsel's perceptions of appellant, raised the distinct possibility that appellant lacked the "ability to consult with his lawyer with a reasonable degree of rational understanding" and further lacked an adequate "understanding of the proceedings against him." Dusky v. United States, supra. At the very least this information provided the "reasonable cause" required by 18 U.S.C. §4244. United States v. Polisi, 514 F.2d 977, 980 (2d Cir. 1975). Accordingly, the Court's failure to determine the issue of appellant's competency by ordering the mandatory competency examination was erroneous.

Therefore, appellant's conviction should be reversed, and a new trial ordered only if appellant is determined

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* Appellant's pre-sentence report indicates that the Probation Department found he had "below average intelligence" and appeared "pathetic" and "defeated" during his interview.

to be competent after appropriate examination. United States v. Polisi, supra; cf. Drope v. Missouri, supra; Pate v. Robinson, supra.

POINT II

THE GOVERNMENT FAILED TO ESTABLISH THAT APPELLANT KNEW THE CHECK CASHED BY "HANK" WAS FORGED.

Appellant was indicted on one count of uttering a forged check while acting together with "Hank", in violation of 18 U.S.C. §495. That statute prohibits the uttering of a forged writing with intent to defraud the United States while "knowing the same to be forged." Thus, knowledge is an essential element of the crime [United States v. Sullivan, 406 F.2d 180, 186 (2d Cir. 1969); United States v. Rosenstein, 434 F.2d 640, 641 (2d Cir.), cert. den. 401 U.S. 921 (1971)] and, as applied to this case, the Government was required to prove that appellant knew that the check cashed by "Hank" was in fact forged.

The Government, however, offered no direct proof of appellant's knowledge and, while this element may no doubt be proven circumstantially [cf. United States v. Sweig, 441 F.2d 114, 117 (2d Cir.), cert den. 403 U.S. 932 (1971)], there was an absence of evidence from which the jury could reasonably infer such knowledge. United States v. Taylor, 464 F.2d 240 (2d Cir. 1972).

There was no proof in this case that appellant had ever possessed the check in question or that he had ever seen the check.* Indeed, Plotnick, the broker who cashed the check, testified that the check was in Hank's possession, that it was presented to him after Hank had endorsed it in his presence, and that appellant had never "touched" it. Moreover, there was no evidence that appellant ever saw either the identification Hank showed to Plotnick or the signature Hank used in endorsing the check.** In short, there was no evidence that appellant actually knew the name of the real payee of the check, or the name that Hank had used in endorsing the check, and therefore there was no evidence that appellant knew that Hank had forged the check.

This gap in the evidence was not bridged by Plotnick's testimony that appellant had introduced Hank to Plotnick as "John Mansfield"*** and had assured Plotnick that "everything was fine" with the check. Regardless of the name by which appellant knew or introduced Hank, the fact remains that there was no evidence that appellant knew either the name of the payee of the check or the signature Hank had used

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* Appellant in fact denied that Hank had ever shown him the check.

** Plotnick, himself, testified that appellant smelled of alcohol when he appeared with Hank on March 5, 1973. In view of appellant's likely inebriated state and the fact that he had only a second grade education, it is entirely possible that he would not have been able to decipher the signature Hank had used in endorsing the check even if appellant had seen it.

*** Appellant testified that he introduced Hank as "Hank" and not as "John Mansfield."

to endorse it. It remains pure speculation that appellant knew that Hank had forged John Mansfield's name. Accordingly, "there was not a sufficient rational basis from which a jury . . . could infer guilt." United States v. Brown, 236 F.2d 403, 406 (2d Cir. 1956).

In United States v. Sullivan, supra, this Court affirmed the conviction of another "poor, bedraggled derelict" who had forged and uttered a forged check in a similarly "sloppy and unconvincing manner." There, however, the defendant himself had told a ticket agent that he wished to cash the check and that the check belonged to his wife, an assertion which proved to be false. Moreover, the defendant had actually endorsed the check which he presented to the ticket agent for cashing. Based on this evidence, this Court found that appellant did intend to cash the check knowing that it was forged.

Here, appellant never possessed the check and never signed it. Rather, he merely vouched for the authority to sign the check of a person who, for all that the evidence shows, may well have led appellant into believing that to be so. Thus, the absence of those facts which led this Court to affirm the conviction in Sullivan militate towards a reversal of appellant's conviction.*

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* Even if this Court finds the evidence otherwise sufficient to convict appellant, his conviction should still be reversed because the facts proving guilt here are even less substantial than in Sullivan where Judge Medina, dissenting, believed the charges should be dismissed:

(Continued on next page)

In contrast to the deficient nature of the Government's case, there was every reason to believe appellant's defense that he thought Hank had authority to negotiate the check. If appellant was criminally involved in the scheme to cash a forged check, it would hardly have been reasonable to attempt to do so with Plotnick, who knew appellant's name and address. Surely, appellant would have gone instead to someplace where he was not known. Nor can it be argued, as the prosecutor did below, that it was precisely because Plotnick knew appellant that appellant chose him to cash the forged check. Since the "full identification" that Hank showed Plotnick was sufficient to convince the insurance broker of Hank's identity as "John Mansfield," there is no reason to believe that someone else who did not know appellant would not have been similarly fooled.

Moreover, after being informed by Plotnick a year later that the Government now knew the check had been forged, appellant did not attempt to flee. Not only did he from the beginning stoutly maintain to Plotnick and to Agent Quinn that he thought the check belonged to "Hank," but he also provided Agent Quinn with every assistance he could in locating Hank.

(Footnote continued from last page) . . .

> In my opinion this poor, bedraggled derelict, for many years a chronic alcoholic, should not have been prosecuted. There are and must be times when the strong arm of the law should be stayed out of pure mercy. And, I wonder whether, now and then, we do not spin out rules of law with all too fine distinctions of general application, at the expense of that sensitivity to the meting out of justice in the particular case before the Court, which lies at the base of any system of law worthy of the name.
> (406 F.2d at 187)

In sum, the inference that appellant knew the check Hank cashed was forged hangs on too slender an evidentiary thread to permit appellant's conviction to stand. Therefore, appellant's conviction should be reversed and the indictment against him dismissed.

CONCLUSION

FOR THE ABOVE-STATED REASONS APPELLANT'S CONVICTION SHOULD BE REVERSED AND EITHER THE INDICTMENT DISMISSED OR A NEW TRIAL ORDERED BEFORE WHICH APPELLANT SHOULD BE EXAMINED AS TO COMPENTENCY PURSUANT TO 18 U.S.C. §4244.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Feb 13, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Nathan Silberman